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286-161—68

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 867

CHARLES JOSEPH BATTAGLIA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 383 F. 2d 303.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1967. On October 24, 1967, Mr. Justice Douglas extended petitioner's time for filing a petition for a writ of certiorari until December 2, 1967, and the petition was filed on December 1, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the act of extortion of which petitioner was convicted affected interstate commerce within the meaning of the Hobbs Act.

2. The government disclosed, prior to trial, that petitioner had been the subject of trespassory electronic surveillance. The times and places of the surveillance were revealed and logs of the monitored conversations were turned over to the court and defense counsel. At a hearing held for the purpose the government established to the satisfaction of the court that the proof which it proposed to present against petitioner at the trial had had an independent origin and development. The remaining questions presented are:

a. Whether the court properly excluded from the scope of the hearing the question as to who had authorized the installation of the eavesdropping equipment;

b. Whether it was material that the monitored conversations included talks, unrelated to the matters charged in the indictment, between petitioner and an attorney who had represented him in certain civil matters;

c. Whether this Court, in the exercise of its supervisory powers, should hold that in consequence of the electronic surveillance petitioner is immune to punishment for his offense, committed during the surveillance, notwithstanding the demonstrated lack of connection between the surveillance and the evidence on which the conviction was based.

STATUTE INVOLVED

18 U.S.C. 1951 (the Hobbs Act) provides in pertinent part:

> § 1951. *Interference with commerce by threats or violence.*
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by * * * extortion * * * shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear * * *.
>
> (3) The term "commerce" means * * * all commerce between any point in a State * * * and any point outside thereof; * * * and all other commerce over which the United States has jurisdiction.
>
> * * * * * *

STATEMENT

Following a non-jury trial, in the United States District Court for the District of Arizona, petitioner was convicted on a single-count indictment charging that he and two codefendants, Salvatore Spinelli and Teddy Estes, obstructed and affected commerce, in violation of 18 U.S.C. 1951 (the Hobbs Act), by using

threats of force to secure space in a bowling alley for a coin-operated pool table (1 R. 4–5; 7 R. 314).[1] On February 17, 1967, petitioner was sentenced to ten year's imprisonment and to pay a fine of $10,000 (8 R. 30).

1. In December 1963, Jerome Greenwell, the proprietor of a bowling alley in Tucson, Arizona, and Jack Gumbin, who operated a cocktail lounge on adjacent premises, agreed that Gumbin might install a coin-operated pool table in the bowling alley and that the two would share in the profits (4 R. 82–83, 95; 7 R. 268–269, 276–277). At the time, petitioner was maintaining vending and pinball machines on the bowling alley premises pursuant to a similar profit-sharing arrangement with Greenwell (4 R. 85–93). A few days after the installation of the pool table, petitioner complained to Greenwell that he and Greenwell had an agreement under which such devices would be obtained only from him (4 R. 95–96). When Greenwell denied the existence of any such agreement petitioner "reminded" Greenwell of what had "happened to Serotta"—Louis Serotta, a mutual acquaintance, had been found murdered in the trunk of his automobile (4 R. 84, 97). Petitioner also commented that Greenwell had an attractive wife, that petitioner "kn[e]w which way she [went] home," and that he was sure Greenwell did not want "anything to happen" to her—or to a factory which he owned (4 R. 82, 98–99).

Concerned for his wife's safety, Greenwell sought

[1] Spinelli and Estes were acquitted following a separate trial which preceded that of petitioner (1 R. 99).

to accommodate petitioner by buying Gumbin's pool table for petitioner and replacing Gumbin with petitioner in the profit-sharing arrangement. Gumbin, however, refused to sell the table at the price offered by petitioner, with the consequence that the table remained in the bowling alley under the terms of the original agreement (4 R. 99–100, 107–108; 7 R. 216–218, 279–282). One night the felt surface of the table was slashed with a sharp instrument (4 R. 100; 7 R. 243–244). When Greenwell, in a conversation with petitioner, accused two of petitioner's associates of damaging the table, petitioner said, "If you think the slashing of the cover is so bad, how would you like to have a bowling ball through the slate?" (4 R. 101). As a result of the conversation Greenwell told Gumbin to remove the pool table and it was replaced with one supplied by petitioner (4 R. 102; 7 R. 270–271).

It was stipulated at the trial that the table which was removed had been shipped to Arizona from its place of manufacture outside the State (1 R. 84–87; Pet. 7–8).

2. A week before the trial began, the government disclosed to the court and defense counsel that, at various times during the period 1961–1964, petitioner had been the subject of electronic surveillance conducted by the F.B.I. as part of its continuing investigation of organized crime. The times and places of the surveillance were revealed and the logs of all conversations (overheard in the course of the surveillance) to

[3] Attempts were made to make recordings of the conversations but because of mechanical failures no tapes were obtained (4 R. 21; 5 R. 76, 82–84; 6 R. 241–242).

which petitioner was a party or in which he was mentioned were turned over to counsel and the court (1 R. 69–70; 4 R. 6; 5 R. 20–22; 6 R. 200). The logs consisted of notes made by agents who monitored the conversations and wrote down portions they deemed significant (5 R. 75; 6 R. 157–158, 245).[2] Petitioner moved to suppress the use by the government at the trial of any evidence obtained through this means or which had resulted from leads so obtained (1 R. 63–64). At a pretrial hearing on the motion (volumes 5 and 6 of the record) the government represented to the court, and undertook to prove, that the evidence which it proposed to present against petitioner had been obtained by it independently of the electronic surveillance (5 R. 17–19, 22–23).[3] At the conclusion of the hearing, the court held that the government had satisfactorily established the absence of any connecting link between the proof it proposed to present at the trial and any information received through the electronic surveillance (6 R. 252–254).

At the hearing the government, after advising the court and defense counsel of the names of all witnesses whom it proposed to call at the trial (5 R. 22), produced the F.B.I. agent, Earl Fauver, who had investigated the activities of petitioner which had resulted in the present prosecution (5 R. 24–25). Fauver testified concerning the development of the case against petitioner and how he had come to interview the various witnesses (5 R. 25–30). The agent testi-

[3] This was the burden which the defense contended, and the court held, the government was required to bear (5 R. 5–6, 9, 10, 12).

fied that he was assigned to the investigation in April 1964 as a result of Greenwell's having reported petitioner's conduct and threats to the Tucson Police (5 R. 25–26). Fauver, who during the relevant period was attached to the Phoenix office of the F.B.I. (5 R. 24), testified that he had been unaware during his investigation that electronic surveillance of petitioner had been conducted by the Tucson office; that no F.B.I. agent—connected with that office or any other—had at any time suggested any person for him to interview; and that none of the information gathered by him was to his knowledge in any way connected with the surveillance (5 R. 26–27).[4]

Defense counsel, who had had possession of the logs of the overheard conversations for several days prior to the hearing, was unable at the hearing to point to anything in the logs that connected the present prosecution with the surveillance.

ARGUMENT

1. There is no merit in petitioner's contention that the act of extortion of which he was convicted did not affect interstate commerce within the meaning of the Hobbs Act (Pet. 7–10). As this Court observed in *Stirone* v. *United States*, 361 U.S. 212, 215, the Hobbs Act "speaks in broad language, manifesting a pur-

[4] Kermit Johnson, the senior resident F.B.I. agent in Tucson, under whose supervision some of the electronic surveillance was conducted (5 R. 73–74; 6 R. 236–237, 240), testified, in corroboration of Fauver, that he had never informed Fauver of the maintenance of the surveillance (5 R. 86). Like testimony was given by James Cornett, an investigative clerk in the Tucson office of the F.B.I., who had also participated in the surveillance (6 R. 236–241, 246–249).

pose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.'" In this case, the evidence established that the pool table which petitioner forced Greenwell to remove from his bowling alley had been shipped to Arizona from its place of manufacture outside the State. That the owner's immediate supplier was an Arizona dealer does not undermine the conclusion that commerce was affected. "[A] deliberate act which tends to prevent articles from being used once they have reached their destination after being shipped in interstate commerce dams up the stream of commerce and delays, obstructs and affects commerce as surely as though the same act had cut off the supply at its source." *United States* v. *Stirone,* 168 F. Supp. 490, 496 (W.D. Pa.), affirmed, 262 F. 2d 571 (C.A. 3), reversed on other grounds, *Stirone* v. *United States,* 361 U.S. 212.[5] Cf. *Nick* v. *United States,* 122 F. 2d 660, 668 (C.A. 8), certiorari denied, 314 U.S. 687

[5] Petitioner's reliance on the dissenting views of Judge Hastie in the *Stirone* case, 262 F. 2d at 579 (quoted at pages 8–10 of the petition), is misplaced. Judge Hastie's comments had reference to the alternative basis on which the question of Stirone's guilt or innocence had been submitted to the jury (discussed in the majority opinion at pages 574–575)—the theory that the requisite impact of the defendant's activities on interstate commerce could be found from the fact that the ready-mixed concrete which the extortion victim manufactured was *to be used* in the construction of an as-yet non-existent mill, which, when built, would manufacture articles that *would be* shipped interstate. Nothing like the situation to which Judge Hastie's remarks were addressed is involved in this case, which involved an existing article in existent commerce.

(extortion from motion picture film exhibitors; "[i]f exhibitors are prevented or seriously obstructed in exhibiting the films they will not buy them. If exhibitors will not buy the films they will not be shipped in interstate commerce"). See, also, *National Labor Relations Board* v. *Reliance Fuel Corporation*, 371 U.S. 224.

Viewed in isolation, petitioner's threats of violence against the proprietor of a single bowling alley, concerning a single coin-operated pool table in his establishment, undoubtedly had very limited impact on the flow of interstate commerce. But this Court has recognized that whether or not a practice may be deemed to affect commerce "is not to be determined by confining judgment to the quantitative effect of the activities immediately" at hand and that "[a]ppropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 648. Similarly, it is apparent that the illegal business methods which petitioner was here shown to have employed, if left unchecked, could have a significant impact.

2. Petitioner's claim that the trial court improperly restricted the scope of the hearing on the motion to suppress (Pet. 11–20) is unsound. The ultimate issue for resolution was whether the evidence which the government proposed to present against petitioner was the fruit of the government's acknowledged sur-

veillance or whether "its proof had an independent origin." *Nardone* v. *United States*, 308 U.S. 338, 341; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392; *Wong Sun* v. *United States*, 371 U.S. 471, 487–488. Through the testimony of Agent Fauver the government affirmatively showed that its case against petitioner—including its leads to the witnesses through whom the evidence was to be presented—had originated independently of the eavesdropping. Since the proposed testimony was not the fruit of the illegal eavesdropping the question of who had authorized the installation of the eavesdropping equipment—which petitioner contends he was erroneously precluded from exploring (Pet. 16)—was irrelevant.[6]

We also dispute petitioner's claim that the "scope of counsel's inquiry was sorely limited" (Pet. 16). Counsel was not "blocked from an inquiry into the physical nature of the installation * * * of the surveilling microphones" (Pet. 16). The essential nature

[6] In disclosing the surveillances, the government had represented to the court that no recordings had been made (1 R. 70; 4 R. 21) and Agent Johnson, who was generally familiar with the monitoring and under whose supervision some of it had occurred, so testified at the hearing (5 R. 76, 80–84). The agent acknowledged that efforts had been made to record the conversations, but he stated that, due to mechanical failures, the attempts had not been successful (5 R. 82–84). While petitioner argues that the latter testimony of the agent was false and implausible (Pet. 13), it is to be noted that the testimony was corroborated by James Cornett, a clerk in the F.B.I. Tucson office who had participated in the monitoring (6 R. 236, 238–241) and who likewise referred to the malfunctioning of the recording equipment (6 R. 241–242).

of the eavesdropping equipment (microphones, amplifier, and connecting wires) was established (5 R. 75–76).[7] Nor was counsel foreclosed from inquiring into the "identity of the person who made the installation[s]" (Pet. 20). This matter was developed at the hearing and the name of the individual was revealed (5 R. 99–103; 6 R. 139, 243, 251–252). Nor was counsel barred from inquiring into whether surveillances other than those admitted by the government had been conducted.[8] The court specifically invited counsel to interrogate Agent Johnson (the senior resident

[7] Correctly deeming the matter immaterial, the court accepted as true for purposes of the decision counsel's expressed belief and offer to attempt to prove that the wires used included telephone company lines (6 R. 182–183, 251–252).

[8] The defense offered to prove at the hearing through one Addock, a former Tucson police officer, that an F.B.I. agent who had died before the hearing had once told him that electronic eavesdropping equipment had been installed in an office of petitioner's company (located at 3533 East Speedway in Tucson) other than the offices of the company in which the government had acknowledged placing such equipment (6 R. 219, 221–224). The proffered testimony was excluded as hearsay (6 R. 224–227). Petitioner contends that this ruling was error, arguing that the testimony should have been received under the exception to the hearsay rule which permits the reception of hearsay declarations "against interest" (Pet. 16–17). However, the exception to the hearsay rule on which petitioner relies applies to statements against interest "of a pecuniary character" (*Donnelly* v. *United States*, 228 U.S. 243, 273) and is thus inapposite. Significantly, although defense counsel stated to the court that he believed he could establish through a living witness—one Snell, a former employee of the F.B.I., who had installed the eavesdropping equipment—that such equipment had also been installed at the above-mentioned Speedway address (6 R. 182–183), and although the court indicated it would admit such testimony if counsel wished to call Snell (6 R. 251–252), counsel chose to forego the opportunity to do so (6 R. 252).

agent at the Tucson F.B.I. office, where the monitoring was carried out) on this matter, but counsel declined to do so stating that he did not wish to be limited by the witness' "knowledge" and that there might be someone with "superior knowledge" (5 R. 98).[9]

The court did not abuse its discretion in refusing to permit defense counsel to explore the F.B.I.'s confidential files—either to search for evidence that surveillances of petitioner other than those admitted had been made or for any other purpose (see Pet. 17). Since the government had represented at the outset that it was producting the logs of all conversations in which petitioner had participated and petitioner had failed to establish that there was any reason to believe that other conversations in which petitioner participated were overheard, there was no reason for the district court to permit defense counsel to rummage through the government's files. Moreover, as stated above, the government affirmatively proved at the hearing that its case against petitioner had originated and been developed independently of any electronic surveillance.

[9] While it is true that the court ruled at one point in the hearing that the place at which a particular monitored conversation had taken place was immaterial (6 R. 169) (see Pet. 16), it was apparent from the information disclosed by the government where each conversation had occurred. The information disclosed included the dates on which and the places at which the several surveillances had occurred and no two surveillances had been conducted contemporaneously (1 R. 69; 5 R. 21–22). It was thus apparent from the dates on the logs where each conversation had taken place.

3. Also without merit is petitioner's claim that his conviction is tainted because the monitored conversations included talks between him and an attorney (Pet. 20–22). Although the attorney, Joseph Soble, did represent petitioner in connection with the present criminal case from the time of the filing of the indictment, in March 1965, till the fall of that year (6 R. 230–232),[10] no conversation between the two during that period was monitored; indeed, no electronic surveillance of petitioner was conducted during that period. Soble, who had represented petitioner and his company in various civil matters in 1963 and 1964 (6 R. 228–230), testified that in the early part of 1964 he had a conversation with petitioner in which petitioner had told him of a "big argument" he had had with Greenwell (6 R. 233)—an apparent reference to the dispute between the two referred to in the Statement (p. 4, *supra*). However, the earliest date in 1964 during which petitioner was subjected to surveillance was June 18, 1964 (1 R. 69; 5 R. 21), and defense counsel was unable to point to any log of a conversation between petitioner and the attorney which referred either to this conversation or to any other pertinent matter.

Petitioner concedes that the intrusions in issue "certainly * * * did not turn up the Government's case" (Pet. 21) and he does not dispute the court of appeals' observation that the evidence at the hearing showed "an absence of any connection between what

[10] Soble did not represent petitioner at the trial.

was overheard and the indictment and the trial of Battaglia" (Pet. App. A 10a; Pet. 20). This being so, the instrusions are without relevance.

4. Petitioner's final contention—that this Court, in the exercise of its supervisory powers, should direct that the indictment be dismissed (Pet. 22–24)—is also unsound. Commencing with *Weeks* v. *United States*, 232 U.S. 383, and continuing to the present day, the method by which the Court has enforced constitutional restraints on law-enforcement officials has been the rule of exclusion—denying to the prosecuting authority the benefits of improperly obtained evidence. Where there is no connection (direct or indirect) between the improper activity and the evidence proposed to be presented, there is nothing to suppress. No sound reason exists why this case should be singled out for the uniquely drastic treatment proposed by petitioner. Cf. *Black* v. *United States*, 385 U.S. 26; *O'Brien* v. *United States*, 386 U.S. 345; *Hoffa* v. *United States*, 387 U.S. 231.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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